



U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Subject: INFORMATION: Procurement of
Transportation Enhancement Projects

Date: November 12, 1996

From: Associate Administrator for
Program Development

Reply to
Attn. of: HNG-22

To: Regional Administrators

In response to several inquiries from the field, we have decided to authorize the State highway agencies (SHA's) to procure transportation enhancement projects, not located within the highway right-of-way, under the procedures of the "Common Rule." This decision is consistent with 49 CFR 18.36(j) and our treatment of other nontraditional programs funded with Federal-aid funds, such as the Recreational Trails Program.

The Federal Highway Administration (FHWA) was one of the 23 Federal Agencies that adopted the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" (also known as the Common Rule - 49 CFR 12). The FHWA adopted the Common Rule on March 11, 1988. The Office of Management and Budget approved certain exceptions to the Common Rule based on existing legislation specific to each agency that adopted the rule.

One of the FHWA's exceptions to the Common Rule provides for competitive bidding on highway construction projects. Specifically, 49 CFR 18.36(j) states:

"23 U.S.C. 112(a) directs the Secretary to require the recipients of highway construction grants to use bidding methods that are effective in securing competition." Detailed construction contracting procedures are contained in 23 CFR part 635, subpart A."

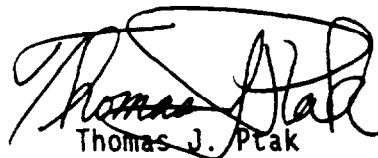
This exception to the Common Rule was developed prior to the passage of the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 and implementation of the transportation enhancement program established in the ISTEA. Since that time, SHA's and local public agencies have developed numerous enhancement projects that are transportation related, but may not always be located within the highway right-of-way. Some of these projects are relatively low cost (e.g., restoration of historic railroad stations, hiking/bicycle paths, landscaping and scenic beautification).

It is often not cost-effective to use the competitive bidding procedures in 23 CFR 635A to procure such services for low cost projects. The Common Rule offers more flexibility to the States with regard to the method of

procurement for such low cost projects. Therefore, transportation enhancement projects not located within the highway right-of-way may be procured under State procedures.

Highway related projects must still meet the linkage criteria noted in our July 28, 1994, memorandum concerning the applicability of Davis-Bacon to Transportation Enhancement Projects (copy attached). A project would be highway related if it is "linked" to a Federal-aid highway based on proximity or impact (i.e., without the Federal-aid highway the project would not exist). For transportation enhancement projects that are within the highway right-of-way, a contracting agency will continue to follow the procedures in 23 CFR 635A.

We intend to address these and other FHWA Common Rule exceptions in a future rulemaking.



Thomas J. Ptak

Attachment

U.S.C.

Transportation Enhancement Activities

Title 23 - Highways

Sec. 101. Definitions and declaration of policy

The term "transportation enhancement activities" means, with respect to any project or the area to be served by the project, provision of facilities for pedestrians and bicycles, acquisition of scenic easements and scenic or historic sites, scenic or historic highway programs, landscaping and other scenic beautification, historic preservation, rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals), preservation of abandoned railway corridors (including the conversion and use thereof for pedestrian or bicycle trails), control and removal of outdoor advertising, archaeological planning and research, and mitigation of water pollution due to highway runoff.

Sec. 133. Surface transportation program

(b) ELIGIBLE PROJECTS....:

(8) Transportation enhancement activities.

(d) ALLOCATIONS OF APPORTIONED FUNDS.--

(2) FOR TRANSPORTATION ENHANCEMENT ACTIVITIES.--10 percent of the funds apportioned to a State under section 104(b)(3) for a fiscal year shall only be available for transportation enhancement activities.

(5) Applicability of certain requirements to third party sellers.--

(A) In general.--Except as provided in subparagraphs (B) and (C), in the case of a transportation enhancement activity funded from the allocation required under paragraph (2), if real property or an interest in real property is to be acquired from a qualified organization exclusively for conservation purposes (as determined under section 170(h) of the Internal Revenue Code of 1986), the organization shall be considered to be the owner of the property for the purpose of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.).

(B) Federal approval prior to involvement of qualified organization.--If Federal approval of the acquisition of the real property or interest predates the involvement of a qualified organization described in subparagraph (A) in the acquisition of the property, the organization shall be considered to be an acquiring agency or person as described in section 24.101(a)(2) of title 49, Code of Federal Regulations, for the purpose of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

(C) Acquisitions on behalf of recipients of federal funds.--If a qualified organization described in subparagraph (A) has contracted with a State highway department or other recipient of Federal funds to acquire the real property or interest on behalf of the recipient, the organization shall be considered to be an agent of the recipient for the purpose of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

(3) PAYMENTS.--

(A) In general.--Except as provided in subparagraph (B), the Secretary shall make payments to a State of costs incurred by the State for the surface transportation program in accordance with procedures to be established by the Secretary. Payments shall not exceed the Federal share of costs incurred as of the date the State requests payments.

(B) Advance payment option for transportation enhancement activities.--

(i) In general.--The Secretary may advance funds to the State for transportation enhancement activities funded from the allocation required by subsection (d)(2) for a fiscal year if the Secretary certifies for the fiscal year that the State has authorized and uses a process for the selection of transportation enhancement projects that involves representatives of affected public entities, and private citizens, with expertise related to transportation enhancement activities.

(ii) Limitation on amounts.--Amounts advanced under this subparagraph shall be limited to such amounts as are necessary to make prompt payments for project costs.

(iii) Effect on other requirements.--This subparagraph shall not exempt a State from other requirements of this title relating to the surface transportation program.

(5) Transportation enhancement activities.--

(A) Categorical exclusions.--To the extent appropriate, the Secretary shall develop categorical exclusions from the requirement that an environmental assessment or an environmental impact statement under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) be prepared for transportation enhancement activities funded from the allocation required by subsection (d)(2).

(B) Nationwide programmatic agreement.--The Secretary, in consultation with the National Conference of State Historic Preservation Officers and the Advisory Council on Historic Preservation established under title II of the National Historic Preservation Act (16 U.S.C. 470i et seq.), shall develop a nationwide programmatic agreement governing the review of transportation enhancement activities funded from the allocation required by subsection (d)(2), in accordance with--

(i) section 106 of such Act (16 U.S.C. 470f); and

(ii) the regulations of the Advisory Council on Historic Preservation.

Sec. 134. Metropolitan planning

(f) FACTORS TO BE CONSIDERED.--In developing transportation plans and programs pursuant to this section, each metropolitan planning organization shall, at a minimum, consider the following:

(5) The programming of expenditure on transportation enhancement activities as required in section 133.

(g) DEVELOPMENT OF LONG RANGE PLAN.--

(1) IN GENERAL.--Each metropolitan planning organization shall prepare, and update periodically, according to a schedule that the Secretary determines to be appropriate, a long range plan for its metropolitan area in accordance with the requirements of this subsection.

(2) LONG RANGE PLAN.--A long range plan under this section shall be in a form that the Secretary determines to be appropriate and shall, at a minimum:

(D) Indicate as appropriate proposed transportation enhancement activities.

Sec. 135. Statewide planning

(f) TRANSPORTATION IMPROVEMENT PROGRAM.--

(1) DEVELOPMENT.--The State shall develop a transportation improvement program for all areas of the State. With respect to metropolitan areas of the State, the program shall be developed in cooperation with metropolitan planning organizations designated for metropolitan areas in the State under section 134. In developing the program, the Governor shall provide citizens, affected public agencies, representatives of transportation agency employees, other affected employee representatives, private providers of transportation, and other interested parties with a reasonable opportunity to comment on the proposed program.

(2) INCLUDED PROJECTS.--...The program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for such project within the time period contemplated for completion of the project. The program shall also reflect the priorities for programming and expenditures of funds, including transportation enhancements, required by this title.